85-186

No. ———

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

BURLINGTON NORTHERN, INC.,
Petitioner,

v.

KENNETH A. HEROLD, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a railroad which has voluntarily added to its locomotive a warning device not required by federal regulations may remove that device for repairs without facing liability for violation of the federal Boiler Inspection Act, 45 U.S.C. § 23?

2. Whether, in view of comprehensive federal regulation, a railroad whose locomotive is fully equipped under Federal Railway Administration standards may be held liable in a negligence action for the absence of an additional piece of equipment?

PARTIES TO THE PROCEEDINGS BELOW AND SUPREME COURT RULE 28.1 STATEMENT

In addition to the parties named in the caption, Janet Herold appeared before the courts below as a plaintiff/appellee and cross-appellant.

As a result of a corporate reorganization, petitioner Burlington Northern, Inc., is now known as Burlington Northern Railroad Company. The petitioner's parent corporation, created in that reorganization, is now called Burlington Northern, Inc. Burlington Northern Railroad Company's partially owned subsidiaries and affiliates are:

Burlington Northern Railroad Company:

- The Belt Railway Company of Chicago
- Camas Prairie Railroad Company
- Davenport, Rock Island and North Western Railway Company
- The Denver Union Terminal Railway Company
- Galveston Terminal Railway Company
- Houston Belt & Terminal Railway Company
- Iowa Transfer Railway Company
- Kansas City Terminal Railway Company
- Keokuk Union Depot Company
- The Lake Superior Terminal and Transfer Railway Company
- Longview Switching Company
- The Minnesota Transfer Railroad Company
- Paducah & Illinois Railroad Company
- Portland Terminal Railroad Company
- The Saint Paul Union Depot Company
- Terminal Railroad Association of St. Louis
- Trailer Train Company
- The Wichita Union Terminal Railway Company
- Winona Bridge Railway Company

The El Paso Company:

El Paso Natural Gas Company:

El Paso Development Company:

Lake Country
Windjammer, Inc.:

Adams Canyon Ranch
Santa Paula Farms

El Paso Hydrocarbons Company:

Minera San Pedro Corralitos, S.A.

Meridian Petroleum Holding, Inc.:

Meridian Oil, Inc. (formerly Milestone Petroleum, Inc.):

Butte Pipe Line Company
Portal Pipe Line Company

New Mexico and Arizona Land Company:

NZ Development Corp.
NZ Properties, Inc.

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BURLINGTON NORTHERN, INC.,
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KENNETH A. HEROLD, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Burlington Northern Railroad Company, formerly Burlington Northern, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on May 2, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 761 F.2d 1241 (8th Cir. 1985), and appears in the Appendix at 1a. The District Court's memorandum and order denying Burlington Northern's motion for judgment not-

withstanding the verdict or a new trial, which has not been reported, appears in the Appendix at 16a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Eighth Circuit was entered on May 2, 1985. App. at 24a. A timely petition for rehearing and rehearing *en banc* was denied on June 6, 1985. App. at 25a. The judisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTES AND REGULATIONS INVOLVED

Section 2 of the Boiler Inspection Act, as amended, 45 U.S.C. § 23 (1982), is set forth in the Appendix at 32a. Section 202(a) of the Federal Railroad Safety Act of 1970, as amended, 45 U.S.C. § 431(a) (1982), is set forth in the Appendix at 32a. Section 205 of the Federal Railroad Safety Act of 1970, 45 U.S.C. § 434 (1982), is set forth in the Appendix at 33a. The Federal Railroad Administration regulations that were in effect at the time of the accident that gave rise to this suit, 49 C.F.R. §§ 230.231(a), 230.234 (1974) (current versions at 49 C.F.R. §§ 229.125(a), 229.129 (1984)), are set forth in the Appendix at 34a.

STATEMENT OF THE CASE

Petitioner, Burlington Northern Railroad Company ("BN"), has been found liable to respondent, Kenneth Herold, in the amount of $9.4 million, for injuries respondent sustained in a grade crossing accident with one of petitioner's trains. The judgment was obtained on the theory that the railroad was negligent in operating the train's locomotive without an amber warning beacon, which had been removed for repairs. It is undisputed that such beacons were not required by federal safety standards. Nevertheless, the Court of Appeals for the Eighth Circuit upheld the judgment, reasoning that once

the railroad had installed an alerting light, it could not remove it without violating the Boiler Inspection Act.[1]

This case thus raises two important federal questions. The first is whether the Boiler Inspection Act, which prohibits a railroad from using a locomotive unless its parts and appurtenances are "safe to operate in the service to which the same are put,"[2] precludes a railroad from removing a nonessential piece of equipment for repair. The second is whether a railroad whose locomotive is fully equipped under federal standards may nevertheless be held liable in a negligence action for the absence of an additional piece of equipment. Because the decision below threatens to impose substantial liability on those railroads who voluntarily install devices not required by federal regulations, and because the issues raised here affect the day-to-day operations of the nation's railroads, petitioner seeks review by this Court.

I. REGULATORY FRAMEWORK

Railway safety—and particularly railway safety equipment—has been the subject of extensive federal regulation for decades. Beginning in 1893 with the Safety Appliance Acts,[3] Congress has specified particular items of safety equipment which must be utilized by railroads operating in interstate commerce. Through the Boiler Inspection Act of 1911, as amended,[4] Congress conferred upon the Interstate Commerce Commission ("ICC") the power to regulate railroad locomotives and their "appurtenances." *See Lilly v. Grand Trunk Western Railroad*, 317 U.S. 481, 485-86 (1943). In the exercise of this power, the ICC adopted rules requiring the installation of a wide variety of devices and equipment. *See, e.g.*,

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[1] 45 U.S.C. § 23 (1982).

[2] *Id.*

[3] 45 U.S.C. §§ 1 *et seq.* (1982).

[4] 45 U.S.C. §§ 22 *et seq.* (1982).

Napier v. Atlantic Coast Line Railroad, 272 U.S. 605, 609 n.1 (1926) (collecting rules).

The Boiler Inspection Act also imposed on a railroad the duty to maintain the locomotive and its "appurtenances" in "proper condition and safe to operate in the service to which the same are put." 45 U.S.C. § 23 (1982). A violation of this duty resulted in strict liability in suits brought by railroad workers under the Federal Employers' Liability Acts ("FELA").[5] *See Urie v. Thompson*, 337 U.S. 163, 188-91 (1949). However, because of the extensive federal regulation of locomotive equipment, state regulations purporting to require *additional* equipment on the locomotive were held preempted. *Napier v. Atlantic Coast Line Railroad*, 272 U.S. 605 (1926).

In 1970, Congess enacted the Federal Railroad Safety Act,[6] "the most comprehensive rail safety legislation ever reported to the Congress."[7] Congress recognized that existing federal safety legislation, such as the Boiler Inspection Act, totally preempted state safety standards, and specifically decided to preserve that total preemption of these areas of railroad safety.[8] Congress authorized the Department of Transportation ("DOT") to prescribe additional safety standards in all other areas of railroad safety. 45 U.S.C. § 431(a) (1982). Congress mandated that state standards for railway safety would be

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[5] 45 U.S.C. §§ 51 *et seq.* (1982).

[6] Pub. L. No. 91-458, 84 Stat. 971 (codified at 45 U.S.C. §§ 421 *et seq.* (1982)).

[7] H.R. Rep. No. 1194, 91st Cong., 2d Sess. 8 (1970), *reprinted in* 1970 U.S. Code Cong. & Ad. News 4104, 4106.

[8] *Id.* at 8, 10-11, 16, *reprinted in* 1970 U.S. Code Cong. & Ad. News at 4105, 4108, 4113-14; *see Marshall v. Burlington Northern Inc.*, 720 F.2d 1149, 1153 (9th Cir. 1983); *Consolidated Rail Corp. v. Pennsylvania Public Utility Commission*, 536 F. Supp. 653 (E.D. Pa.), *aff'd*, 696 F.2d 981 (3d Cir. 1982), *aff'd mem.*, 461 U.S. 912 (1983).

preempted, except where DOT had not yet adopted a standard "covering the subject matter of such State requirement" or where the state standard was addressed to an "essentially local safety hazard." 45 U.S.C. § 434 (1982).

Upon the creation of the Department of Transportation, the power of the Interstate Commerce Commission to regulate locomotive equipment, as well as its other functions in the safety area, were transferred to the Federal Railway Administration ("FRA") within that Department.[9] The FRA has adopted extensive regulations with respect to locomotive equipment. 49 C.F.R. pt. 229 (1984). FRA regulations require both a headlight meeting certain specifications as to illumination power, 49 C.F.R. § 229.125 (1984), and an "audible warning device" (*i.e.*, a whistle) with a specified minimum sound level, 49 C.F.R. § 229.129 (1984). However, the FRA has never had any requirement that a locomotive have an amber or other rotating beacon.

II. THE ACCIDENT

The case arose from a November 21, 1974 grade crossing accident involving a BN train and a cattle truck. The truck was driven by respondent Kenneth Herold, and respondent Janet Herold, his wife, was a passenger. Kenneth Herold was gravely injured as a result of the collision, and Janet Herold suffered less serious injuries.

The accident occurred in broad daylight (3:30 p.m.) at a grade crossing east of Dickinson, North Dakota. The crossing was marked by a railroad cross buck and a stop sign. The evidence indicated that the respondents' view of the approaching train was unobstructed, and that the cattle truck failed to stop at the stop sign.

At the time of the accident the lead locomotive was equipped with a whistle and a twin-beam headlight, as

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[9] Department of Transportation Act, Pub. L. No. 89-670, 80 Stat. 931 (1966).

required by federal regulations.[10] The locomotive's headlight was on and operating. Prior to the time of the accident BN had removed from the locomotive for repair a rotating amber beacon, a device which was not required by FRA regulations, but which BN had voluntarily installed on many of its locomotives.

III. DISTRICT COURT PROCEEDINGS

The respondents commenced this diversity action in September 1980 by filing a complaint in which they alleged that their injuries were the proximate result of BN's negligence, including BN's alleged failure to equip its locomotive with adequate lights. BN moved to strike the allegations of the complaint pertaining to this purported duty to equip its locomotive with additional lights, arguing that the area of locomotive equipment was preempted by the Boiler Inspection Act and by FRA standards covering locomotive warning devices. The District Court denied that motion. BN subsequently moved for reconsideration on the ground that the FRA had issued a decision which terminated a five-year investigation of the subject of locomotive alerting lights by deciding that alerting lights such as the beacon involved in this case should *not* be required equipment.[11] The trial court denied this motion as well.

On the third day of trial, following the Ninth Circuit's decision in *Marshall v. Burlington Northern, Inc.*, 720

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[10] 49 C.F.R. §§ 230.231(a), 230.234 (1974), App. at 34a.

[11] The FRA initiated these proceedings in 1978, after having conducted research regarding the problem of grade crossing accidents over a number of years. *See* 43 Fed. Reg. 9324, 9325 (1978). In 1982, the FRA issued a notice of proposed rulemaking in which it proposed requiring either a rotating beacon of the kind involved in this case, or other alerting lights such as strobe lights or oscillating headlights. 47 Fed. Reg. 44791, 44795 (1982). The FRA terminated the proceedings in May 1983, however, finding that the evidence in the record did not support the proposition that such additional alerting lights were effective in reducing the incidence of grade crossing accidents. 48 Fed. Reg. 20257 (1983).

F.2d 1149 (9th Cir. 1983), BN again moved to exclude any evidence relating to additional warning lights beyond those mandated by federal regulation. The District Court initially indicated that if the lead locomotive was equipped as required by the applicable federal regulations, BN had complied as a matter of law with its duty to provide adequate warning devices.[12] In response to a subsequent request for clarification, however, the District Court stated that even if the amber beacon was not required by federal regulations, the question whether BN acted reasonably in operating its locomotive *without* the amber beacon was an issue to be decided by the jury.[13]

In addition, although the District Court repeatedly stated at the outset that it did not construe the Boiler Inspection Act to impose liability on a railroad for *removing* an optional device such as the amber beacon,[14] the District Court ruled during trial that this beacon was an "appurtenance" of the locomotive within the meaning of the Act, and that facts concerning the removal of the beacon could be introduced as evidence of a violation of that Act.[15]

As a result of these rulings, the respondents made the amber beacon a major issue at trial.[16] After the Dis-

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[12] Trial transcript ("Tr.") at 293-94, 310-11.

[13] *Id.* at 308-11.

[14] *See, e.g., id.* at 424:

> Now I want to make this point: I don't read the Boiler Inspection Act to deny to the Railroad the option of removing something that is either neutral or harmful in terms of efficient operation of the engine.

See also id. at 294, 296, 308-09, 432.

[15] *Id.* at 854-55.

[16] The District Court recognized the potential impact of this issue on the trial, characterizing it as "the one clear thing that a plaintiff's jury could hang on." *Id.* at 443. The District Court also noted that "this matter of running the locomotive with the

trict Court ruled that respondents could inquire regarding the beacon, the respondents raised this issue with six of their nine remaining witnesses on liability. The respondents were permitted to introduce evidence regarding the effectiveness of such beacons, and to demonstrate an amber beacon to the jury. Plaintiffs' counsel argued in closing that the absence of the beacon was unlawful. BN moved at the close of trial to strike all evidence regarding the amber beacon, but the District Court denied that motion.[17]

The case was submitted to the jury on a negligence theory. The District Court instructed the jury that a violation of a statutory duty could constitute evidence of negligence. Notwithstanding uncontradicted expert testimony that the amber beacon was not an "essential" or "integral" part of a locomotive,[18] the District Court instructed the jury as a matter of law that the amber beacon was an "appurtenance," and read to the jury the provision of the Boiler Inspection Act making it unlawful to use a locomotive unless its appurtenances are in proper condition and safe to operate.[19]

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part missing up front is the kind of thing which, if I let it in when I should have kept it out, would be prejudicial." *Id.* at 441-42.

[17] *Id.* at 2045-47.

[18] Russel Dixon, a retired FRA inspector formerly responsible for the seven-state region which included North Dakota, testified that an amber beacon was *not* an integral or essential part of a complete locomotive, and to his knowledge was not required by the Boiler Inspection Act or any other law or regulation. *Id.* at 2020-21, App. at 41a-42a; *see also* testimony of Raymond Spannring, *id.* at 841-42, App. at 36a-37a. In addition, Mr. Dixon testified that operating a locomotive from which the railroad had *removed* such a beacon did not violate the Boiler Inspection Act or any other federal law or regulation. *Id.* at 2019-20, App. at 41a-42a.

[19] App. at 44a. The District Court refused an instruction based on *Marshall* stating that BN was not required to have alerting devices on its locomotive other than the ones in use at the time of

The jury returned a verdict for the respondents, finding BN eighty percent negligent and Kenneth Herold twenty percent negligent. The jury awarded Kenneth Herold $9,425,000 for his injuries and losses, and awarded Janet Herold $250,000 for her injuries, and $2,000,000 for loss of consortium.

BN moved for judgment n.o.v. or, in the alternative, a new trial. The District Court ordered a new trial on the limited issue of Janet Herold's damages for loss of consortium, unless Mrs. Herold agreed to a remittitur, but otherwise denied BN's motion. Mrs. Herold declined to accept the remittitur.

IV. COURT OF APPEALS DECISION

On appeal, the Court of Appeals for the Eighth Circuit affirmed. While recognizing that federal regulations "required only a headlight and whistle on locomotives," App. at 6a, the Eighth Circuit found that liability could be predicated on the absence of the amber beacon and therefore sustained the admission of evidence on that subject. App. at 10a-11a. The Court of Appeals affirmed the District Court's ruling that the beacon was an "appurtenance" for purposes of the Boiler Inspection Act. App. at 10a. The Eighth Circuit reasoned that "once any part or appurtenance is attached to a locomotive, the Boiler Inspection Act requires it be maintained in good repair at all times." App. at 8a. Because BN had voluntarily attached the beacon to its locomotive, but then subsequently removed it, the Court of Appeals held that "[t]he jury could have reasonably concluded the beacon was not 'in

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the accident. Instead, the District Court read to the jury an instruction stating in part:

> The duty of the railroad to exercise reasonable care at public highway crossings is not necessarily fulfilled by compliance with the statutes given to you in these instructions, or with regulations governmental agencies may have promulgated.

App. at 43a.

proper condition and safe to operate,' in violation of 45 U.S.C. § 23, and that this violation contributed to the collision." App. at 10a-11a.

BN filed a timely petition for rehearing *en banc*, arguing that the Eighth Circuit's decision was in conflict with the Ninth Circuit's decision in *Marshall*, improperly expanded the scope of railroad liability under the Boiler Inspection Act, and frustrated Congress' express intent to ensure nationally uniform railroad safety standards. The Court of Appeals denied this petition, but granted BN a stay of execution pending the filing of this petition for certiorari.[20]

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS MISCONSTRUED THE BOILER INSPECTION ACT IN A WAY THAT DISCOURAGES THE USE OF OPTIONAL SAFETY EQUIPMENT

Under the Eighth Circuit's decision, a railroad may be found to have violated the Boiler Inspection Act by using a locomotive from which it has removed a non-essential, non-required safety device. This is an unprecedented expansion of the liability imposed on railroads under the Boiler Inspection Act, 45 U.S.C. § 23 (1982), and disregards this Court's clear mandate that the Boiler Inspection Act must not be construed in a manner that would penalize and inhibit voluntary efforts to improve railroad safety. *Southern Railway v. Lunsford*, 297 U.S. 398, 402 (1936).

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[20] A motion to stay issuance of the mandate was filed on June 12, 1985, but this motion was denied on June 18, 1985. Judgment was entered on the mandate on June 21, 1985. A motion for recall of the mandate and reconsideration of BN's motion for a stay was filed on June 21, 1985. On June 25, 1985, the Court of Appeals denied the motion for reconsideration, but ordered that execution and enforcement of the judgment be stayed pending the filing of this petition for certiorari.

The language of the Boiler Inspection Act plainly addresses only the *use* of unsafe appurtenances. Section 2 of the Act, as amended, provides in relevant part that it is unlawful for any carrier

> to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate *in the service to which the same are put*, that the same may be employed in the *active service* of such carrier without unnecessary peril to life or limb . . . .

45 U.S.C. § 23 (1982) (emphasis added). The statute is thus clearly intended to prevent the active use of locomotive appurtenances which are improperly maintained or otherwise unsafe, thereby "increas[ing] the peril" to the locomotive crew and others. *See Southern Railway v. Lunsford*, 297 U.S. 398, 402 (1936).

The legislative history of the Boiler Inspection Act underscores that Congress' real concern was the *use* of unsafe equipment, not the nonuse of additional safety equipment. The House Report on the 1915 amendment to the Boiler Inspection Act,[21] for example, which for the first time extended the scope of the Act beyond the locomotive boiler to include all parts and appurtenances, focused on the problem of railroads "keeping parts other than the boiler of the locomotive in improper repair and *using the equipment* when not up to the correct standard." [22]

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[21] Act of Mar. 4, 1915, ch. 169, 38 Stat. 1192.

[22] H.R. Rep. No. 995, 63d Cong., 2d Sess. 1 (1914) (emphasis added). The House Report on the 1924 amendment, Act of June 7, 1924, ch. 355, 43 Stat. 659, similarly cited the growing number of accidents "resulting from the *failure* of some part or appliance of the locomotive or tender." H.R. Rep. No. 490, 68th Cong., 1st Sess. 3 (1924) (emphasis added). In addition, a letter from the Interstate Commerce Commission noted that the relevant provision proposed "to make . . . carriers liable for *using defective* locomotives on their lines." *Id.* at 5 (emphasis added); *see also* S. Rep. No. 740, 68th Cong., 1st Sess. 2, 4-6 (1924).

Consistent with this legislative intent, violations of the Boiler Inspection Act have been found in cases where workmen are injured by defective equipment in use on a locomotive.[23] Petitioner is aware of *no* case, however, in which a railroad has been held to have violated the Boiler Inspection Act as a result of its *failure* to use a nonessential piece of equipment.[24]

Moreover, the courts have recognized that liability should not be imposed on railroads under the Boiler Inspection Act for accidents occurring when the locomotive itself is not "in use."[25] Rather than recognize a comparable limitation on railroad liability when a nonessential piece of equipment has been removed from "active service," the Eighth Circuit has adopted a construction of the Boiler Inspection Act which is fundamentally inconsistent.

The Eighth Circuit's extension of the Boiler Inspection Act to include cases in which railroads have removed nonessential devices from their locomotive is similarly inconsistent with this Court's landmark decision in *Southern Railway v. Lunsford*, 297 U.S. 398 (1936). *Lunsford* involved a mechanism known as "Wright's Little Watchman," which was designed to trigger the locomotive's

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[23] *E.g., Lilly v. Grand Trunk Western Railroad*, 317 U.S. 481 (1943); *Baltimore & Ohio Railroad v. Groeger*, 266 U.S. 521 (1925); *Southern Railway v. Bryan*, 375 F.2d 155 (5th Cir.), *cert. denied*, 389 U.S. 827 (1967).

[24] While the Eighth Circuit referred to a large number of Boiler Inspection Act cases in its Opinion (*see* App. at 8a-10a), none of these cases is concerned with a device that has been removed from the locomotive, and none suggests, even in dictum, that the removal of a nonessential safety device could constitute a violation of the Act.

[25] *See, e.g., Steer v. Burlington Northern, Inc.*, 720 F.2d 975 (8th Cir. 1983); *Estes v. Southern Pacific Transportation Co.*, 598 F.2d 1195 (10th Cir. 1979); *Tisneros v. Chicago & North Western Railway*, 197 F.2d 466 (7th Cir.), *cert. denied*, 344 U.S. 885 (1952).

brakes in the event of a derailment, and which was actually attached to the locomotive at the time of the accident. *Id.* at 399-400. The petitioner in that case had utilized these devices for seven years, and had equipped nearly all of its passenger locomotives with them. *Id.* at 400. This Court concluded, however, that the Watchman was not an "appurtenance" of the locomotive within the meaning of the Act:

> With reason, it cannot be said that Congress intended that every gadget placed upon a locomotive by a carrier, for experimental purposes, should become part thereof within the rule of absolute liability. So to hold would hinder commendable efforts to better conditions and tend to defeat the evident purpose—avoidance of unnecessary peril to life or limb.

Id. at 402. Instead, this Court held that liability under the Boiler Inspection Act extended only to those parts or appurtenances that are "integral or essential parts of a completed locomotive," and to those attachments that are specifically prescribed by the Interstate Commerce Commission.[26]

This case involves a situation parallel to *Lunsford.* Expert testimony in this case indicated that the amber beacon was "a relatively new innovation," which did not fulfill initial expectations.[27] In addition, the evidence at trial indicated that at the time of the accident, approxi-

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[26] In so holding, this Court expressly rejected the position advocated by the respondents in this case: that for purposes of liability under the Boiler Inspection Act, "[t]he carrier 'creates its own standards of safety by the appliances which it places on its own locomotive.'" *Southern Railway v. Lunsford,* 297 U.S. at 402.

[27] Testimony of Raymond Spannring, Tr. at 845-46, App. at 39a; *id.* at 2023-25. Mr. Spannring also testified that the beacon was attached to the top of the locomotive with three bolts, and could be removed in five minutes using pliers, a crescent wrench, or a socket or box wrench. *Id.* at 844, App. at 38a.

mately 400 BN locomotives were not equipped with amber beacons,[28] and that five of the country's major railroads operated their locomotives without any alerting lights other than the federally mandated headlight.[29] Indeed, the FRA has specifically decided that such lights should not be required equipment on locomotives, due to lack of evidence of their effectiveness in preventing grade crossing accidents.[30] The amber beacon involved in this case is thus precisely the kind of "gadget" that this Court held is not covered by section 2 of the Boiler Inspection Act: one that "do[es] not increase the peril, but may prove helpful in an emergency." *Southern Railway v. Lunsford*, 297 U.S. at 402.[31]

Notwithstanding this Court's holding in *Lunsford* that a railroad is not responsible under the Boiler Inspection Act for the failure of such a device, the Eighth Circuit now reaches precisely the opposite result. Moreover, while the *Lunsford* Court held that the railroad was not liable under the Boiler Inspection Act for the malfunction of an optional safety device which was *in use* on the locomotive, the Eighth Circuit now holds that a railroad is liable for such a device even when it is *not* in use. The Eighth Circuit's decision thus turns this Court's decision in *Lunsford* on its head.

The practical ramifications of this decision are serious and broad-reaching. As a result of the Eighth Circuit's decision, every railroad that has voluntarily equipped any of its locomotives with any kind of alerting light—whether

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[28] *Id.* at 841-43, App. at 36a-37a.

[29] Testimony of Russel Dixon, *id.* at 1810-12.

[30] 48 Fed. Reg. 20257 (1983) (Termination of Rulemaking).

[31] *Cf. Woods v. New York, C. & St. L. R. Co.*, 339 Ill. App. 132, 88 N.E.2d 740, 743 (1949) ("Defendant being under no obligation under the Boiler Inspection Act to provide a light on the rear of the tender, it is not liable under that act if a light installed, but not required by the act, was not properly focused."), *cert. denied*, 340 U.S. 830 (1950).

amber beacons, oscillating headlights, strobe lights, or other devices—faces substantial potential liability unless it maintains those particular lights in place and functioning. The railroads are thus effectively deprived of the option of removing such lights, regardless of whether they prove to be useful or efficient, or even of replacing them with alternative warning devices which prove to be preferable in light of experience and evolving technology.[32]

Moreover, the Eighth Circuit's reasoning is not limited to alerting lights. Instead, under this decision a railroad's removal of *any* device that it had voluntarily installed on one of its locomotives could be found to be a violation of the Boiler Inspection Act, subjecting the railroad to substantial libility. The inevitable result of the Eighth Circuit's decision is to create a major disincentive to the development and implementation of innovative safety technology. After *Herold*, railroads would be ill-advised to equip or retrofit their locomotives with any optional safety equipment whatsoever.

The legal straitjacket created by the Eighth Circuit will impair the ability of railroads to deal with a recurring problem of national significance. According to FRA statistics, 2,826 people were injured in railroad grade crossing accidents during last year alone, and another 639 people were killed.[33] Far from encouraging voluntary railroad efforts to attempt to improve railroad safety, however, the Eighth Circuit's decision effectively penalizes such an effort. Through its misconstruction of the Boiler

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[32] For the first time, moreover, railroads will be exposed to civil penalties for the removal of optional alerting lights. Section 9 of the Boiler Inspection Act, as amended, 45 U.S.C. § 34 (1982), provides for penalties of up to $2,500 for each violation of the Act. Paradoxically, as a result of the Eighth Circuit's decision in this case, these statutory penalties could be imposed on a railroad for the absence from a locomotive of a device that the FRA has expressly decided should not be required equipment.

[33] Office of Safety, Federal Railroad Administration, U.S. Dep't of Transportation, *Accident/Incident Bulletin No. 153, Calendar Year 1984*, at 23, 24 (June 1985).

Inspection Act, the Eighth Circuit has thus achieved precisely the result that this Court sought to avoid in *Lunsford*: to "hinder commendable efforts to better conditions and tend to defeat the evident purpose [of the Boiler Inspection Act]—avoidance of unnecessary peril to life and limb." *Southern Railway v. Lunsford*, 297 U.S. at 402.

II. THE DECISION BELOW EXEMPLIFIES CONTINUING CONFUSION IN THE COURTS OVER THE LIABILITY OF RAILROADS THAT HAVE COMPLIED WITH FRA REGULATIONS

The Eighth Circuit's decision in this case is the latest in a series in which litigants have attempted to impose liability on railroads for the failure to utilize equipment that was not required by federal safety standards. The conflicting results reached by the courts in these cases have raised important and unsettled questions regarding the effect of compliance with FRA safety regulations, and the relationship between federal railroad safety standards and state common law duties.

This case raises the basic question of whether a railroad whose train is fully equipped under federal standards can be held liable for negligence for operating without a particular, additional safety device. The Court of Appeals for the Eighth Circuit held that the absence of a piece of equipment not required by the FRA regulations could form the predicate for negligence liability, at least where the item had previously been attached to the locomotive. This result conflicts with the conclusion of the Ninth Circuit in *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (1983), that a railroad which has met the FRA standards with respect to equipment has "complied as a matter of law with its duty to provide locomotive warning devices" and cannot be held liable for the absence of such a device.

In *Marshall*, the plaintiff argued that the railroad's federally mandated headlight was an inadequate warn-

ing device, and that the railroad was negligent in not having also equipped its locomotive with strobe lights or oscillating lights. *Id.* at 1151. The Ninth Circuit held, however, that "under the Boiler Inspection Act the state may not impose liability for failure to install a part or attachment of a locomotive if it is 'within the scope of the authority delegated to the [Secretary]' to prescribe the same part or attachment." *Id.* at 1152 (quoting *Napier v. Atlantic Coast Line Railroad*, 272 U.S. 605, 611 (1926)).[34] Because it was within the scope of the Secretary's authority to prescribe strobe lights or oscillating headlights, the Ninth Circuit concluded that liability could not be imposed on the railroad for failure to equip its locomotive with such devices, and that the district court accordingly erred in admitting evidence regarding these lights. *Id.* at 1152, 1154.[35]

The locomotive involved in this case, like the locomotive in *Marshall*, fully complied with all FRA regulations. Yet in this case, unlike in *Marshall*, the Court of Appeals held that the jury could properly consider whether the railroad was negligent in operating its locomotive without additional safety equipment that was not required by the FRA. While the Eighth Circuit attempted to rationalize this conflict through a misconstruction of the Boiler Inspection Act, the District Court's jury instructions make clear that plaintiffs' theory was negligence and that the Boiler Inspection Act was raised only as evidence of negligence. Thus, the two decisions are, at bottom, inconsistent.

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[34] The Ninth Circuit found that the Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, 84 Stat. 971, evidenced Congress' intent to preserve intact the total preemptive effect of the Boiler Inspection Act. 720 F.2d at 1152-53.

[35] The Court of Appeals found support for its conclusion of preemption in the FRA's determination, after rulemaking, not to require additional alerting devices beyond the headlight and whistle. However, the Court of Appeals emphasized that it relied on other indicia of federal preemptive intent. *Id.* at 1153-54.

Other courts have reached diametrically opposite conclusions as to whether liability for failure to use a piece of equipment can be imposed on a railroad that has complied with federal equipment regulations. For example, two state supreme courts have also reached conflicting results with respect to whether tort liability can be predicated on the absence of an additional alerting light beyond the headlight required by the FRA. *Compare Wiedenfeld v. Chicago & North Western Transportation Co.*, 252 N.W.2d 691 (Iowa 1977) (no duty to equip locomotive with an oscillating headlight, which was not required by FRA regulations) *with Henry v. District Court of the Seventeenth Judicial District*, 645 P.2d 1350, 1352 (Mont.) ("a jury should be permitted to deliberate on whether BN had a common-law duty to equip its locomotive with various warning devices"), *appeal dismissed*, 457 U.S. 1101 (1982). As a result, the nation's railroads now face differing standards of conduct with respect to alerting lights depending on which of the several adjacent states in the Eighth and Ninth Circuits their trains happen to be crossing at any particular time.[36] Nor is this confusion over the effect of compliance with FRA regulations limited to alerting lights. *See Morgan v. Consolidated Rail Corp.*, 509 F. Supp. 281 (S.D.N.Y. 1980) (notwithstanding its special verdict that the railroad had not violated the Boiler Inspection Act, the jury could properly find that the railroad was negligent in failing to add a window screen that would have prevented the plaintiff's injury).

This Court should resolve this continuing confusion with respect to the impact of safety standards set by the FRA. The current lack of any clear guidance for the

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[36] Moreover, the applicable rule may well depend upon whether ensuing litigation winds up in state or federal court, since the Supreme Court of Montana (in *Henry*) and the Ninth Circuit (in *Marshall*) have reached conflicting results, and the Supreme Court of Iowa (in *Wiedenfeld*) and the Eighth Circuit (in *Herold*) have also espoused arguably inconsistent approaches.

railroad industry—which by its very nature is potentially subject to widely divergent standards in numerous jurisdictions—creates intolerable practical problems, particularly in light of the rapid evolution in railroad technology.

At the same time, decisions of the kind rendered below threaten to completely undermine the FRA rulemaking process. The FRA spent five years investigating various kinds of alerting lights, commissioned studies, initiated rulemaking proceedings, invited comments, held a public hearing, considered extensive factual evidence, and submitted a report to Congress pursuant to a statutory mandate.[37] The FRA found "no evidence warranting a finding that alerting lights are effective in reducing accidents," but on the contrary found that a test group of locomotives equipped with alerting lights in fact had a slightly higher rate of grade crossing accidents than a group of locomotives that was not equipped with such lights.[38] Accordingly, the FRA concluded that regulations requiring such lights would not be justified, and terminated its rulemaking proceeding.[39]

Decisions such as *Herold* and *Henry* profoundly undermine such FRA determinations, since railroads may be forced by the prospect of tort liability to equip their locomotives with various unnecessary devices, and to maintain previously installed devices in place, regardless of

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[37] *See* 43 Fed. Reg. 9324 (1978) (Advance Notice of Proposed Rulemaking); 44 Fed. Reg. 34982 (1979) (Notice of Proposed Rulemaking); 47 Fed. Reg. 16189 (1982) (Withdrawal of Notice of Proposed Rulemaking); 47 Fed. Reg. 44791 (1982) (Notice of Proposed Rulemaking); 48 Fed. Reg. 20257 (1983) (Termination of Rulemaking); U.S. Dep't of Transportation, *The Effects of Mounted Oscillating Lights on Leading Railroad Cars* (Mar. 1983) ("DOT Report") (submitted to Congress in response to § 702(c)(j) of the Federal Railroad Safety Authorization Act of 1982, Pub. L. No. 97-468, 96 Stat. 2579, 2579-80 (codified at 45 U.S.C. § 431(j) (1982)).

[38] 48 Fed. Reg. at 20258.

[39] *Id.*

cost or utility. As the Department of Transportation indicated in its report to Congress, any rule requiring an additional device, such as oscillating headlights, may "compel railroads to reallocate resources from programs already proven successful in reducing the rate of accidents at grade crossings; and the consequence of such a . . . rule may be an increase in rail-highway crossing accidents." [40]

In addition, decisions of the kind rendered below directly threaten the careful balance of state and federal interests established by Congress in the Federal Railroad Safety Act of 1970. In this legislation, Congress reaffirmed the preemptive effect of earlier statutes and further expressly declared "that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable." [41] The House Commerce Committee Report on this legislation emphasized that the railroad industry is a national system, which "has a truly interstate character calling for a uniform body of regulation and enforcement." [42] The Committee specifically noted, moreover, that "[t]o subject a carrier to enforcement before a number of different State administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce." [43] Thus, with express limited

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[40] DOT Report, *supra* note 37, at 1.

[41] 45 U.S.C. § 434 (1982); *see National Association of Regulatory Utility Commissioners v. Coleman*, 542 F.2d 11, 13-14 (3d Cir. 1976) (section evinces "a 'total preemptive intent' ").

[42] H.R. Rep. No. 1194, 91st Cong., 2d Sess. at 13, *reprinted in* 1970 U.S. Code Cong. & Ad. News at 4110. The House committee cited the newly-formed BN as illustrative of the interstate character of the railroad industry, noting that BN and its subsidiaries operated in 19 states. *Id.*

[43] *Id.* at 13, *reprinted in* 1970 U.S. Code Cong. & Ad. News at 4110-11; *cf. Swift & Co. v. Wickham*, 230 F. Supp. 398, 407-08 (S.D.N.Y. 1964) (noting, in connection with the rule of total

exceptions not applicable here, Congress preempted state standards of railway safety.[44]

Decisions such as the one below and *Henry* undermine Congress' expressed intent that federal safety standards should govern the obligations of the nation's railroads. 45 U.S.C. § 434 (1982). Permitting states to impose common law liability on a railroad which has fully complied with federal safety regulations would both frustrate Congress' goal of establishing nationally uniform safety standards, and unduly burden interstate commerce.[45] Indeed, if every local jury were permitted to find that a railroad breached a duty of care by failing to use a particular kind of light, horn, or other safety device, there would be no real national standards whatsoever, and the FRA's rulemaking process would be virtually meaningless. *Cf. Dawson v. Chrysler Corp.*, 630 F.2d 950, 962-63 (3d Cir. 1980) (citing the serious problems arising from a case-by-case system of establishing automobile safety requirements), *cert. denied*, 450 U.S. 959 (1981).

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preemption under the Boiler Inspection Act, the potentially "paralyzing effect on railroads from prescription by each state of the safety devices obligatory on locomotives that would pass through many of them"), *appeal dismissed*, 382 U.S. 111 (1965), *aff'd*, 364 F.2d 241 (2d Cir. 1966), *cert. denied*, 385 U.S. 1036 (1967).

[44] An early version of the Federal Railroad Safety Act had specifically provided that compliance with federal standards would not result in an exemption from liability under state law. *See Federal Standards for Railroad Safety: Hearings on H.R. 16980 Before the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. 25 (1968). However, after widespread criticism of this proposal at the hearing, the language creating this exception was dropped.

[45] *Cf. San Diego Unions v. Garmon*, 359 U.S. 236, 246-47 (1959) (a state may not indirectly regulate through its tort system where Congress has preempted the field); *Farmers Union v. WDAY*, 360 U.S. 525, 535 (1959) (state cause of action for libel preempted by federal regulation).

The continuing uncertainty over railroads' obligations to install or maintain particular kinds of safety devices will impose substantial, and unwarranted, financial burdens on the railroad industry. The FRA estimated the "net present value cost" of additional alerting lights, for example, to be $45,632,000, based on a twenty-year forecast.[46] The cost of oscillating headlights—the particular kind of alerting light at issue in *Marshall*—was estimated at $254,000,000 over twenty years.[47] If railroads cannot rely on FRA standards—or even on FRA determinations that particular devices should *not* be required—they may be forced to utilize these and other such devices regardless of their effectiveness or cost.

In sum, the several conflicting decisions with respect to the effect of compliance with FRA regulations have left the nation's railroads without clear guidance as to their responsibilities for adding additional equipment. At the same time, the perverse interpretation of the Boiler Inspection Act adopted by the Court below has created a disincentive to experimentation with any new types of safety devices. Resolution of these issues is essential to the efficient operation of the national railroad system and to the development of a sound approach to railroad safety.

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[46] 47 Fed. Reg. at 44794.

[47] DOT Report, *supra* note 37, at 8. This figure includes the cost of equipping new locomotives, retrofitting existing locomotives, and maintenance. *Id.*

CONCLUSION

For each of the foregoing reasons, the Court should grant this petition for certiorari.[48]

Respectfully submitted,

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August 1, 1985

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[48] Alternatively, petitioner requests that the decision below be summarily reversed on the authority of *Southern Railway v. Lunsford*, 297 U.S. 398 (1936), and *Napier v. Atlantic Coast Line Railroad*, 272 U.S. 605, 612-13 (1926).

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-2094

KENNETH A. HEROLD and
JANET HEROLD,

Appellees,

v.

BURLINGTON NORTHERN, INC.,
a foreign corporation,

Appellant.

No. 84-2115

KENNETH A. HEROLD and
JANET HEROLD,

Appellants,

v.

BURLINGTON NORTHERN, INC.,
a foreign corporation,

Appellee.

Appeals from the United States
District Court for the
District of North Dakota

Submitted: January 16, 1985

Filed: May 2, 1985

Before: LAY, Chief Judge, JOHN R. GIBSON and FAGG, Circuit Judges.

LAY, Chief Judge.

Kenneth and Janet Herold were injured when a Burlington Northern train hit their cattle truck as they crossed the railroad tracks adjacent to the Schnell Livestock Auction Market outside Dickinson, North Dakota on the afternoon of November 21, 1974. Kenneth Herold was driving the truck. He was rendered a spastic quadriplegic and suffered brain damage. His wife, Janet, also was seriously injured; breaking her collar bone, injuring her back, and suffering a concussion along with cuts and bruises over the body.

Suit was filed in September 1980, seeking damages for injuries, loss of income, Janet's loss of consortium and punitive damages. The jury returned a verdict for the Herolds against the railroad. The jury found Burlington Northern eighty percent negligent and Kenneth twenty percent negligent. Kenneth was awarded $9,425,000 for his injuries and losses. Janet was awarded $250,000 for her injuries and $2,000,000 for loss of consortium. The court, the Honorable Bruce M. Van Sickle, dismissed plaintiffs' claim for punitive damages. Kenneth's award and Janet's loss of consortium award were reduced by twenty percent.

Burlington Northern moved for judgment notwithstanding the verdict or a new trial. The motions were denied except as to Janet's consortium award. The district court ordered a new trial on the issue of damages for loss of consortium unless Janet would accept remittitur to $300,000. She refused and a new trial is pending for Janet's claim.

On appeal, the railroad presents four issues: (1) whether judgment notwithstanding the verdict should have been entered for the railroad either because the Herolds' failure to stop at the crossing was the proximate cause of the accident or Kenneth's negligence was at least equal to the railroad's negligence; (2) whether it was proper for the district court to treat an amber rotating beacon as an "appurtenance" under the Boiler

Inspection Act; (3) whether it was proper for the district court to admit evidence regarding automatic crossing signal systems; and (4) whether the verdicts were excessive. The Herolds cross-appealed on three issues: (1) whether the claim for punitive damages should have been dismissed; (2) whether Janet's loss of consortium award should be reduced by the percentage of negligence assigned to Kenneth; and (3) whether it was proper for the district court to set aside the verdict and order a new trial on the issue of damages for Janet's loss of consortium.

Because we find the jury's verdicts for Kenneth and Janet's injuries are supported by substantial evidence their judgments will be affirmed. We find the district court erred in reducing Janet's loss of consortium claim by the percentage of negligence assigned to Kenneth. On Janet's claim for loss of consortium damages we find the district court's order for a new trial is interlocutory and not appealable at this time.

I. The Comparative Negligence of the Railroad and Kenneth Herold

The railroad crossing had no electronic signals. Traffic was warned only by a faded stop sign affixed to a crossbuck. No engineering study had been done by the railroad regarding effective placement of the stop sign. There was evidence that it was placed at a point where it would be ineffective to warn motorists. Besides being in a state of disrepair, the evidence showed that the stop sign was erected by Burlington Northern without authority from the North Dakota Public Service Commission. This action prevented consideration of automatic signal systems as an alternative. There was strong evidence, although disputed, that the train failed to sound its horn. The accident occurred during daylight on a clear, late fall afternoon. The locomotive's headlight was on, but an amber rotating beacon had been removed for repairs. Kenneth was driving at about

ten miles per hour and did not stop before crossing the tracks. The Herold's were leaving a very busy stockyard after delivering cattle. There was evidence the crossing was extra hazardous. In overruling the railroad's motion for judgment notwithstanding the verdict, the district court provides a graphic description of the conditions existing at the time of the unfortunate collision:

> The railroad knew of the disorganized traffic flow, and the converging street system of the Schnell crossing * * *. [C]onsidering the time of day, the size of the sale, and the fact that the sale yard contained parked vehicles, loading and unloading vehicles, crisscrossing men, women and children on foot * * * plus the impediments to a clear view of the track at all times, and the existence of approach streets on both sides of the railroad track * * *. I cannot say no reasonable jury would have found the defendant less than 50% at fault for the accident.

The crew in the locomotive observed the truck approaching the crossing and, when it became apparent the truck would not stop, applied the train's brakes. The train was traveling over forty-three miles per hour and was not able to stop in time to avoid the collision. Under the existing circumstances—the traffic congestion, the pedestrian activity, the obstructed intersection, the complex conjunction of the road and the crossing, the dark color of the train—the jury could reasonably have found the train was traveling at an excessive speed.

There was conflicting evidence sufficient to go to the jury as to the alleged failure of the railroad to use its bell or whistle or otherwise to provide adequate warning. Burlington Northern contends the accident was caused by Kenneth's failure to stop at the crossing, hear the locomotive's whistle, or observe the approaching train. Since the Herold's prevailed, we must view the evidence in the light most favorable to them. The jury was properly instructed on proximate cause and defend-

ant made no objection. While the jury found that Kenneth shared some of the negligence, it determined his action were not the intervening or superceding cause of the collision.

There exists evidence that the Herolds had never seen a train at the Schnell crossing before the accident. There was ample evidence that the road on which the Herolds were traveling was not well-defined and does not approach the railroad track at a right angle. The many distractions at the heavily congested crossing mitigate the Herolds' failure to see the train. Under such circumstances the doctrine that requires a motorist to "see that which is in plain sight" loses its force as a matter of law and the issue becomes one of fact for the trier of fact. The district court mentioned the various impediments to a clear view. We find ample evidence of the maintenance of an extra hazardous crossing by the railroad.

However, Burlington Northern also argues, even if it was negligent, Kenneth Herold was at least equally negligent and, under North Dakota comparative negligence law, the Herolds' recovery should be barred. Both the jury and the district court disagreed. There exists substantial evidence of Burlington Northern's negligence. The evidence of Kenneth Herold's negligence was his failure to stop or to observe the approaching train. As the district court points out "the jury could reasonably conclude from the slow speed of the truck that Kenneth was also looking." The jury's apportionment of negligence was not unreasonable. In light of the conflicting evidence we must give great credence to the findings of the jury and the trial judge. They heard the testimony and reviewed the evidence first hand; many credibility findings must be made in a trial such as this. Appellate courts should be extremely reluctant to interfere with a verdict where twelve jurors sit through a long trial and an experienced and competent trial judge finds no

error in the jury's determination. Viewing the evidence in the light most favorable to the prevailing party, the jury verdict had substantial support and the district court was correct in denying Burlington Northern's post-trial motions.

II. The Amber Rotating Beacon

The Federal Railroad Administration required only a headlight and whistle on locomotives. 49 C.F.R. §§230.231 (a), .234 (1974). However, Burlington Northern equipped its locomotives with amber rotating beacons, attached to the headlight system, at the factory. The railroad argues that federal law pre-empts the field of railroad safety and defines the standard of care. Because amber rotating beacons are not federally mandated, Burlington Northern contends it was improper for the district court to allow any evidence regarding the beacon. At the time of the Herolds' accident, the beacon had been removed from the locomotive for repairs. The railroad relies primarily on *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983). In *Marshall*, the Ninth Circuit held:

> [U]nder the Boiler Inspection Act [45 U.S.C. § 23] the state may not impose liability for failure to install a part or attachment of a locomotive if it is "within the scope of the authority delegated to the [Secretary]" to prescribe the same part or attachment. *Napier v. Atlantic Coast Line R.R.*, 272 U.S. at 611, 47 S. Ct. at 209.

Marshall, 720 F.2d at 1152.

The *Marshall* decision would be persuasive if the Herolds were arguing that the railroad should have installed a beacon on the locomotive and the evidence was introduced for the purpose of showing the locomotive could be made more safe. However, in this case, unlike *Marshall*, there is no issue whether Burlington Northern can be required to install additional warning lights. *See*

Marshall, 720 F.2d at 1152. *Cf. Green v. River Terminal Railway*, 585 F. Supp. 1019, 1026-28 (N.D. Ohio 1984). Burlington Northern had already made the decision to use a beacon and had, in fact, installed one on the locomotive involved in this collision. The district court ruled the beacon was an "appurtenance" of the locomotive within the meaning of the Boiler Inspection Act, 45 U.S.C. § 23.[1] The Act "imposes upon the carrier an absolute and continuing duty to maintain the locomotive, and all parts and appurtenances thereof, in proper condition, and safe to operate in active service without unnecessary peril to life or limb." *Southern Railway Co. v. Lunsford*, 297 U.S. 398, 401 (1936). The beacon was not operating at the time of the collision; it was in the shop being repaired. The court instructed the jury that the beacon was an appurtenance and gave the jury the relevant language of 45 U.S.C. § 23.

The railroad argues that if there was not a duty to install the beacon in the first place, there can be no violation of a duty to keep the light in repair. The railroad's theory is that Congress has pre-empted the field of railroad safety and federal law imposes no duty to install warning devices beyond a headlight and whistle. It is true that the state, through statute or common law, may not require the railroad to install and main-

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[1] § 23. Use of unsafe locomotives and appurtenances unlawful; inspection and tests

It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28 to 30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

tain amber beacons. However, once any part or appurtenance is attached to a locomotive, the Boiler Inspection Act requires it be maintained in good repair at all times. 45 U.S.C. § 23. The argument that there can be no violation of the Act absent a violation of some regulation or order of the Interstate Commerce Commission or Federal Railroad Administration is without merit.[2] This court has previously rejected that limitation:

> While the Interstate Commerce Commission is authorized to make rules and orders in furtherance of the enforcement of this law, nevertheless its failure to make a rule or an order covering every defective condition or construction within the meaning of section 2 of the Boiler Inspection Act by no means relieves the carrier from complying with the provisions of that section.

Louisville & Nashville Railroad v. Botts, 173 F.2d 164, 167 (8th Cir. 1949) *quoting Baltimore & Ohio Railroad v. Groeger*, 288 F. 321, 324 (6th Cir. 1923), *rev'd on other grounds*, 266 U.S. 521 (1925). *See also St. Louis Southwestern Railway v. Williams*, 397 F.2d 147, 149-51 (5th Cir. 1968); *Calabritto v. New York, New Haven & Hartfort Railroad*, 287 F.2d 394, 395-96, 397 (2d Cir.), *cert. denied*, 366 U.S. 928 (1961). If the amber beacon voluntarily installed by Burlington Northern is a part

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[2] The requirement of safe equipment is set by the [Boiler Inspection Act], not by [Interstate Commerce Commission] rule. While the Commission has the power to give more definite content to this standard in specific instances by rules, the failure of the Commission so to act does not relieve a carrier of its obligation to meet the statutory requirement of safe equipment as it may be reasonably interpreted by a jury. * * * It would be indeed an anomaly to require enforcement of a Congressional mandate for safe railroad equipment to depend upon the action or nonaction of an administrative agency.

Calabritto v. New York, New Haven & Hartford Railroad, 287 F.2d 394, 396 (2d Cir.), *cert. denied*, 366 U.S. 928 (1961) (footnotes omitted).

or appurtenance of the locomotive, then failure to maintain it in good operating condition is a violation of the Boiler Inspection Act.

The Act "is to be liberally construed in the light of its prime purpose, the protection of employees and others by requiring the use of safe equipment." *Lilly v. Grand Trunk Western Railroad*, 317 U.S. 481, 486 (1943). Something can be an appurtenance for the purpose of the Act even though it is not required by federal regulation. In *Southern Railway v. Lunsford*, 297 U.S. 398 (1936), the Supreme Court considered a device for avoiding derailments which was not regulated by the ICC. The Court held it was not an appurtenance; not because the device was not required by the ICC but rather because the device was experimental. *Id.* at 402. The Court noted: "Whatever in fact is an integral or essential part of a completed locomotive, *and* all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commission, are within the statute." *Id.* (emphasis added). In contrast, there was an ICC rule in *Lilly* which required the top part of the locomotive be kept clean and dry. The jury had found the railroad liable under the Act because ice had accumulated on the area and caused an employee to slip and fall. The Supreme Court found the ICC rule helpful but unnecessary: "[T]he rule only fortifies a result which we think the jury could probably have reached even in the absence of such a rule." 317 U.S. at 489. *See Whelan v. Penn Central Co.*, 503 F.2d 886, 890 (2d Cir. 1974).

A wide variety of items on locomotives have been found to be within the Act. *Urie v. Thompson*, 337 U.S. 163 (1949) (track sanders; no ICC rule implicated); *Tiller v. Atlantic Coast Line Railroad*, 323 U.S. 574 (1945) (headlight; required by ICC); *Lilly*, 317 U.S. 481 (boiler spout; ICC rule implicated); *Whelan*, 503 F.2d 886 (rear step; no ICC rule implicated); *Chicago, Rock Island & Pacific Railroad v. Speth*, 404 F.2d 291 (8th Cir. 1968) (warning torpedoes; no ICC rule impli-

cated); *Williams*, 397 F.2d 147 (front step; no ICC rule implicated); *Southern Railway v. Bryan*, 375 F.2d 155 (5th Cir.), *cert. denied*, 389 U.S. 827 (1967) (lifting eye; no ICC rule implicated); *Holfester v. Long Island Railroad*, 360 F.2d 369 (2d Cir. 1966) (fuse box; no ICC rule implicated); *Fritts v. Toledo Terminal Railroad*, 293 F.2d 361 (6th Cir. 1961) (fireman's seat; no ICC rule implicated); *Calabritto*, 287 F.2d 394 (locomotive platform; no ICC rule implicated); *Heiselmoyer v. Pennsylvania Railroad*, 243 F.2d 773 (3d Cir.), *cert. denied*, 355 U.S. 833 (1957) (engineer's seat; no ICC rule implicated); *Botts*, 173 F.2d 164 (foot board; no ICC rule implicated); *Bolan v. Lehigh Valley Railroad*, 167 F.2d 934 (2d Cir. 1948) (pilot step; compliance with ICC rule held not to preclude liability); *Hines v. Smith*, 275 F. 766 (7th Cir. 1921) (automatic bell ringer; no ICC rule implicated); *Green v. River Terminal Railway*, 585 F. Supp. 1019 (N.D. Ohio 1984) (radio; no ICC rule implicated); *Zollinger v. Pittsburgh & Lake Erie Railroad*, 373 F. Supp. 913 (W.D. Pa. 1972) (push-pole; no ICC rule implicated); *Seaboard Coast Line Railroad v. Jackson*, 256 So.2d 568 (Fla. 1971), *cert. denied*, 409 U.S. 1001 (1972) (radio; no ICC rule implicated). We find the district court was correct in ruling that the amber beacon was an appurtenance within the meaning of the Boiler Inspection Act.

The evidence at trial showed that amber rotating beacons could be effective safety devices [3] and that the beacon on the locomotive involved in the collision had broken and been removed for repairs. The jury could have reasonably concluded the beacon was not "in proper condition and safe to operate," in violation of 45 U.S.C. § 23,

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[3] Burlington Northern's Yellowstone Division Superintendent John E. Reynolds testified: "The amber rotating beacon, I believe, is rapidly becoming the standard for all railroads. I can say that the top three railroads in crossing safety have all adopted the amber rotating beacon, and that's the Union Pacific, the Santa Fe and the Burlington."

and that this violation contributed to the collision. We find no error in admitting evidence regarding the beacon.[4]

III. Automatic Signals

Burlington Northern complains about the introduction of testimony regarding automatic crossing signals. It is clear, under state law, the railroad had no duty to install automatic signals. *South v. National Railroad Passenger Corp. (AMTRAK)*, 290 N.W.2d 819, 827 (N.D. 1980). However, Burlington Northern contends the jury was given the impression that the railroad had some obligation to install such signals. The argument carries little weight because the railroad admits the jury was properly instructed. The instructions explicitly stated the railroad had no duty to install anything other than a crossbuck, that only the state could authorize additional warning devices, and that the jury could not find defendant negligent for failing to modify or close the crossing. There were no conflicting or ambiguous instructions which might support a conclusion that the jury was confused or misled.

The evidence was material and relevant in light of Burlington Northern's contention that the crossing was not extra hazardous and that the Herolds were negligent. The testimony concerning automatic lights occurred in the context of expert testimony regarding the danger and

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[4] The jury was also instructed under Restatement (Second) of Torts § 324A (1965) on the common law duty of one who voluntarily renders services. Apparently plaintiffs contended that once Burlington Northern equipped its locomotive with an amber rotating beacon, it had a common law duty, defined by § 324A, to maintain that beacon in good working condition. This is essentially the same duty imposed by the Boiler Inspection Act and we fail to see the applicability of § 324A, particularly since it speaks of rendering "services." In any case, Burlington Northern does not contend on appeal that the § 324A instruction was improper. Instead, defendant argued the pre-emptive effect of federal law completely precluded introduction of evidence regarding the beacon.

confusion inherent in the crossing at issue. The evidence was also properly admitted to show Burlington Northern was negligent when it placed a stop sign at the crossing without authorization and without performing any engineering studies. The expert gave his opinion that the crossing was extra hazardous and a proper engineering study would have concluded automatic signals, rather than a stop sign, should be installed. The expert also testified that the presence of a dilapidated stop sign, rather than automatic signals, could have led plaintiffs to believe the crossing was seldom used and not dangerous. His testimony regarding the exact placement of automatic flashers was in support of his contention that the intersection made complex demands on approaching drivers such as Kenneth Herold. The district court did not abuse its discretion in admitting this evidence.

IV. Excessive Verdicts

The awards to Kenneth Herold for injuries and losses, and to Janet Herold for injuries, were substantial. The railroad asks this court to conclude they are excessive as a matter of law. When a verdict is so excessive it shocks the conscience of this court, it will be set aside. *Drotmanns, Inc. v. McGraw-Hill, Inc.*, 500 F.2d 830, 835 (8th Cir. 1974). However, excessiveness of a verdict is basically a matter for the trial court. *Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439, 447-48 (8th Cir.), *cert. denied*, 368 U.S. 929 (1961). In this case the district court carefully reviewed the verdicts in response to the railroad's motions for judgment notwithstanding the verdict or a new trial. The court found the amounts were "not contrary to the great weight of the evidence" and "a reasonably responsible jury could have found the verdict within the framework of the correct law and the admissible evidence * * *."

The assessment of damages lies within the sound discretion of the jury. *Vanskike v. Union Pacific Railroad*, 725 F.2d 1146, 1150 (8th Cir. 1984). Defendant argues

that juries in similar cases have awarded significantly lower amounts. But comparisons are not particularly helpful. Each case must be evaluated on its own merits. *Scoville v. Missouri Pacific Railroad*, 458 F.2d 639, 648 (8th Cir. 1972).

As the district court observed, and the railroad concedes, the injuries sustained by Kenneth Herold were devastating. According to the court "we have a reflective, perceptive, interpretive man trapped in a [sic] ungovernable, unusable body, with no meaningful ability to escape, even through communication." The court also found Janet suffered "substantial injury." Given the facts of this case and the district court's thorough review of the verdict, we cannot say the damages awarded shock the conscience of the court. To be sure, the sums are considerable, but so were the injuries and losses.

V. Punitive damages

On their cross-appeal, plaintiffs argue the district court erred in refusing to submit the issue of punitive damages to the jury. Under North Dakota law, punitive damages may be recovered when the tortfeasor's conduct has been oppressive, fraudulent or malicious. N.D. Cent. Code § 32-03-07 (1976). *Cf. Brown v. Missouri Pacific Railroad*, 703 F.2d 1050 (8th Cir. 1983). There was no evidence showing actual malice, fraud or oppression on the part of Burlington Northern. The Herolds argue, however, that the various negligent acts of the railroad which the evidence supports, add up to recklessness. Malice can be presumed from recklessness. *Dahlen v. Landis*, 314 N.W.2d 63, 69 (N.D. 1981).

We agree with the district court decision to dismiss the claim for punitive damages. Even when all the evidence is viewed in the light most favorable to the Herolds, it simply is not sufficient to sustain a verdict for punitive damages. The Herolds did not have the right of way at the crossing. While the evidence can support a finding of

negligence on the part of the railroad, it cannot reasonably lead to an inference of malice or oppressive conduct. In fact, the acts of putting up a stop sign—even though unauthorized—and ordering the locomotive equipped with an amber rotating beacon are evidence of Burlington Northern's concern for safety. We find no error.

VI. Loss of Consortium

A. Reduction by Kenneth's Negligence

Plaintiffs contend the district court erred when it ordered that any recovery by Janet for loss of consortium must be reduced by the percentage of Kenneth's negligence. Although this court generally defers to the district court's interpretation of local law, in this case we believe the district court was incorrect. Under North Dakota law it is clear that a wife's claim for loss of consortium is an independent right, not contingent upon the rights or liabilities of her husband. *Hastings v. James River Aerie No. 2337*, 246 N.W.2d 747, 751-52 (N.D. 1976). Furthermore, the negilgence of a driver cannot be imputed to his passenger. *Hertz v. Weibe*, 180 N.W.2d 664, 669-70 (N.D. 1970). Also, the North Dakota contributory negligence statute provides that recovery for injury shall be reduced only "in proportion to the amount of negligence attributable to *the person recovering*." N.D. Cent. Code § 9-10-07 (1975) (emphasis added). While there is no North Dakota caselaw directly on point, we believe the Supreme Court of North Dakota would not allow a loss of consortium award to be reduced by the other spouse's negligence. The contrary cases cited by the defendant are from states which consider loss of consortium claims to be derivative actions. *See e.g., White v. Lunder*, 225 N.W.2d 442 (Wis. 1975); *Hamm v. City of Milton*, 358 So.2d 121 (Fla. Dist. Ct. App. 1978).

B. Order for New Trial

The district court has ordered a new trial on the amount of damages for Janet's loss of consortium. Janet

refused remittitur. The court held the award of two million dollars was "contrary to the great weight of the evidence." The court also determined the jury had been swayed by consideration of the Herold's two children, conceived and born after the accident.

An order granting a new trial after the refusal to accept a remittitur is an interlocutory order and not ordinarily appealable. *Central Microfilm Service v. Basic/Four Corp.*, 688 F.2d 1206, 1211 (8th Cir. 1982), *cert. denied*, 459 U.S. 1204, (1983). The narrow exception, which plaintiffs claim is applicable here, arises when the district court enters the order without jurisdiction. According to plaintiffs, the court violated Fed. R. Civ. P. 59 by ordering the new trial, more than ten days after judgment, on a ground not raised by defendant, without notice to the parties or the opportunity to be heard.

In its motion for judgment notwithstanding the verdict or a new trial, Burlington Northern asserted the loss of consortium award was "grossly excessive and unreasonable under the evidence * * *." In its order, the district court held "there is no basis on which the jury could have found that verdict within the framework of the correct law and admissable [sic] evidence." Burlington Northern had argued the excessive verdict resulted from passion and prejudice. The district court ruled that the jury had been swayed by "the drama and the emotional impact of the childrens' conception, birth, care and development under circumstances of a spastic, non-communicating, occasionally violent spouse-father * * *." The district court ordered a new trial on grounds raised by defendant and did not violate Fed. R. Civ. P. 59. We conclude that the order for a new trial was interlocutory and is not appealable at this time.

The judgment of the district court is affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Civil No. A1-80-120

KENNETH A. HEROLD and JANET HEROLD,
Plaintiffs,

vs.

BURLINGTON NORTHERN, INC., A FOREIGN CORPORATION,
Defendant.

[Filed July 23, 1984]

MEMORANDUM AND ORDER

This case, claiming negligence, and before this Court by virtue of 28 U.S.C. 1332 (diversity) was tried between November 22 and December 13, 1983.

The injuries complained of were caused by a farm truck, train collision, which occurred as the Herolds drove north out of a sale stock yard and a west bound freight came across the front of the sale yard.

The verdict was as follows:

Kenneth Herold		$9,425,000.00
Janet Herold	Compensatory damages for personal injuries	$ 250,000.00
	Damages for loss of consortium	$2,000,000.00
The fault of Kenneth Herold		20%
The fault of Janet Herold		0%
The fault of Burlington Northern		80%

The Defendant has moved, by brief, for judgment notwithstanding the verdict, if that is denied, for a new trial, or for a remittitur. As was done in *Thornton v. Equifax*, 467 F. Supp. 1008 (E.D. Ark. 1979), *Rev'd on other grounds*, 619 F.2d 700 (8th Cir. 1980), the motions will be considered in the descending order of their dispositive effect.

Counsel have briefed the evidence and the arguments expertly and exhaustively. So instead of reviewing all of the details of those briefs, I shall confine my observations to those factors which dominate the issues.

I. THE MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

The appropriate motions were made during the trial (Fed. R. Civ. P. 50) and the motion is properly before me.

The motion for judgment notwithstanding the verdict must be denied unless it can meet the same test applied to motions for directed verdict. That test is found in *Polk v. Ford Motor Co.*, 529 F.2d 259, 267 (8th Cir. 1976):

> In passing upon the motion for judgment, the trial court and this court are (1) to consider the evidence in the light most favorable to the plaintiffs as the parties prevailing with the jury; (2) to assume that all conflicts in the evidence were resolved by the jury in favor of the plaintiffs; (3) to assume as proved all facts which plaintiffs' evidence tends to prove; (4) to give the plaintiffs the benefit of all favorable inferences which may reasonably be drawn from the facts proved; and (5) to deny the motion if, reviewing the evidence in this light, reasonable men could differ as to the conclusion to be drawn from it. *Hanson v. Ford Motor Co.*, 278 F.2d 586, 596 (8th Cir. 1960).

The evidence established that the lead engine was being operated in violation of the Boiler Inspection Act, 45 U.S.C. 23, in that an appurtenance, a rotating beacon, had been removed from its bracket for repair, and the engine operated, as the lead engine, without it. The railroad knew of the disorganized traffic flow, and the converging street system of the Schnell crossing; and there was evidence by both sides as to whether appropriate warning signals were given. Thus judgment notwithstanding the verdict cannot be given on the basis of lack of evidence of negligence.

There was uncontroverted evidence that Janet was seen looking west. Defendant concludes from that, that she did not look east. And both parties conclude from the fact that Kenneth drove the truck across the tracks at about ten miles per hour, that he looked neither way. Neither conclusion is the only reasonable one, and since Janet has no memory of the accident and Kenneth cannot communicate, no further evidence than that produced is available.

Drawing a reasonably favorable inference, I conclude that the evidence that Janet looked west allowed the jury to infer she was busy looking both ways. And considering the time of day, the size of the sale, and the fact that the yard contained parked vehicles, loading and unloading vehicles, crisscrossing men, women and children on foot, the jury could reasonably conclude from the slow speed of the truck that Kenneth was also looking.

These facts, plus the impediments to a clear view of the track at all times, and the existence of approach streets on both sides of the railroad track, force me to conclude that I cannot say no reasonable jury would have found the defendant less than 50% at fault for the accident. So judgment notwithstanding the verdict cannot be granted on that basis.

II. THE MOTION TO GRANT A NEW TRIAL.

The standards for grant of a new trial are:

1. Has there occurred a clear prejudicial error of law?
2. Has there occurred a clear prejudicial error of fact?
3. Was the verdict, while not entirely outside the evidence, contrary to the great weight of the evidence?

Thornton, 467 F. Supp. at 1010.

Despite the arguments presented in the defense brief, I find there has been no clear prejudicial error of law or of fact.

Was the verdict, while not entirely outside the evidence, contrary to the great weight of the evidence? This question will be considered along with the third motion, that for a remittitur.

III. THE MOTION TO GRANT A REMITTITUR.

The standard to be applied in considering the motion is:

> Is there no basis on which a reasonably responsible jury could have found that verdict within the framework of the correct law and the admissible evidence?

Thornton, 467 F. Supp. at 1011.

The "verdict" in this case is, of course, the verdict for damages, so now we must evaluate amounts.

Kenneth Herold was found damaged in the sum of $9,425,000.00. Since the jury assessed 20% of the fault against him, his recoverable damages were $9,425,000.00—20% or $7,540,000.00. The uncontroverted evidence established that he suffered extended, generalized brain damage; that he had been reduced to a spastic quadrapelegic; that his memory for current activities was largely lost; that his memories of his youthful health, activities and associates was retentive; and that his pre-

sent mental abilities were low average. Thus we have a reflective, perceptive, interpretive man trapped in a ungovernable, unusable body, with no meaningful ability to escape, even through communication. A more terrible prison is difficult to visualize.

A factor that must be brought into this area of consideration is: Counsel for the defense, at the conclusion of the plaintiffs opening argument, elected to waive argument. Thus the jury heard only the plaintiffs claim that he had suffered injuries in the range of five million to twenty million (Transcript 2183). The jury found nine and one-half million. That is in the lower half of the requested range.

I conclude that the damage figure is not contrary to the great weight of the evidence, and therefore a basis for a new trial is not established.

The motion for a new trial as to the claim of Kenneth Herold is denied.

Since a reasonably responsible jury could have found the verdict within the framework of the correct law and the admissible evidence, the motion for a remittitur as to the claim of Kenneth Herold is denied.

These decisions to deny the motion for a new trial and a remittitur are equally applicable to the problem of the distribution of fault (80%-20%). Therefore, the motion for a new trial as to Kenneth Herold on that issue is also denied.

Janet Herold was found damaged in the amount of $250,000.00 for personal injuries, and not at fault. She did suffer substantial injury from which she has recovered. As to that finding, applying the standards above recited for determination of motion for a new trial and a remittitur, I conclude the basis for granting relief has not been established, and the motions must be denied.

Janet was also found to be damaged from loss of consortium in the amount of $2,000,000.00. Again, the jury went in to deliberate after hearing an argument for two to two and one-half million, and no argument in opposition to those amounts.

But this verdict of $2,000,000.00 for loss of consortium is subject to some problems.

In his opening argument counsel for the Plaintiff brought in the matter of the birth of two children after the accident as part of the background picture. (Transcript 117-18 and Transcript 118-19. Her testimony as to the circumstances of their births are set out at Transcript 1260-65. In the closing argument plaintiffs counsel referred to the children at Transcript 2177 with reference to the plaintiffs inability to communicate, and at Transcript 2179 with refernce to "[W]hat has Janet lost?"

The facts as to the birth of the children are, briefly, that Janet deliberately caused conception of the son, the eldest, in an attempt to help Kenneth master his frustrations, develop a desire to set a fatherly example, and lead him toward recovery. The conception of the daughter was not planned by her but was a result of her reunion with him during his treatment in a behavior modification program undertaken at Rochester, Minnesota. However, while Janet's conduct was noble and commendable, it was clearly an intervening cause and not a direct result of the accident or injury. So the burdens brought on by Kenneth's inability to function as a spouse-father are not compensable. *Moum v. Maercklein*, 201 N.W.2d 399; *Ruberg v. Skelly Oil Co.*, 297 N.W. 2d 746; Restatement 2d Torts 441.

I conclude that the drama and the emotional impact of the childrens' conception, birth, care and development under circumstances of a spastic, non-communicating, occasionally violent spouse-father is a major factor in the size of the verdict for loss of consortium. And we must

remember that the cost of his care and comfort has been included in the verdict received by him.

I conclude further that the verdict for loss of consortium is contrary to the great weight of the evidence; and that there is no basis on which the jury could have found that verdict within the framework of the correct law and admissable evidence.

I conclude that a jury using the evidence as to this matter in a reasonable manner would not have found damages for loss of consortium in an amount in excess of $300,000.00.

Therefore an order for a new trial on the issue of damages for loss of consortium will be granted unless the plaintiff, Janet Herold, accepts a remittitur in the amount of $1,700,000.00, leaving an award for loss of consortium in the amount of $300,000.00.

IT IS ORDERED:

1. The motion for judgment notwithstanding the verdict is denied.
2. The motion for a new trial is denied, except:
3. The motion for a new trial on the issue of loss of consortium is granted Burlington Northern, Inc., unless Janet Herold shall accept by executed instrument, filed with the Clerk of the United States District Court within thirty days of the date of this order, a remittitur in the amount of $1,700,000.00, leaving an award for loss of consortium in the amount of $300,000.00.

Dated at Lincoln, Nebraska this 20th day of July, 1984.

/s/ Bruce M. Van Sickle
BRUCE M. VAN SICKLE
Judge United States District Court

NOTICE OF ENTRY

Take notice that the original of this copy was entered in the office of the clerk of the United States District Court for the District of North Dakota on the 23rd day of July 1984.

EDWARD J. KLECKER
Clerk

By /s/ Andrea Hinkel
Deputy

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
September Term, 1984

No. 84-2094/2115ND

KENNETH A. HEROLD, *et al*,
Appellees,

vs.

BURLINGTON NORTHERN, INC., *etc.*,
Appellant.

[Filed May 2, 1985]

JUDGMENT

This appeal from the United States District Court was submitted on the record of the said District Court, briefs of the parties and was argued by counsel.

After consideration of the premises, it is hereby ordered and adjudged that the judgment of the District Court is affirmed in accordance with the opinion of this Court.

May 2, 1985

Costs taxed in favor of Appellees/Cross-Appellants:

Costs of Appellees/Cross-Appellants' Opening Brief and Reply Brief:	$333.30
Costs of Cross-Appellants' Reply Brief:	$113.30
Total costs of Appellees/Cross-Appellants for recovery from Appellant/Cross-Appellee:	$446.60

A true copy:

ATTEST: Robert D. St. Vrain

Clerk, U.S. Court of Appeals, 8th Circuit.

6/18/85

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
September Term, 1984

Nos. 84-2094/2115-ND

KENNETH A. HEROLD, *et al.*,
Appellees/Cross Appellants,

vs.

BURLINGTON NORTHERN, INC., *etc.*,
Appellant/Cross Appellee.

Appeals from the United States
District Court for the
District of North Dakota

Appellant/cross appellee's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

June 6, 1985

UNITED STATES DISTRICT COURT
NORTH DAKOTA—SOUTHWESTERN DIVISION

Docket Number A1-80-120

HONORABLE BRUCE M. VAN SICKLE

KENNETH A. HEROLD and JANET HEROLD

v.

BURLINGTON NORTHERN, INC.

JUDGMENT IN A CIVIL CASE

☒ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered a verdict.

☐ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED The Jury in the above-entitled matter having entered a verdict in favor of the plaintiffs, Kenneth A. Herold and Janet Herold, and against the defendant, Burlington Northern, Inc., as follows:

KENNETH HEROLD JANET HEROLD	$9,425,000
Compensatory damages for personal injuries	250,000
Damages for loss of consortium	2,000,000

And the Jury further having found liability in the following percentages attributable to:

1. The fault of Kenneth Herold	20%
2. The fault of Janet Herold	0%
3. The fault of Burlington Northern	80%

IT IS ORDERED AND ADJUDGED that the plaintiffs have judgment against the defendant, Burlington Northern, Inc., for damages as follows:

KENNETH HEROLD JANET HEROLD	$7,540,000
Compensatory damages for personal Injuries	250,000
Damages for loss of consortium	1,600,000

CLETUS J. SCHMIDT
Clerk

/s/ DONALD E. EMINETH
Deputy Clerk

Date: December 13, 1983

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiffs have judgment against the defendant for costs and disbursements in the sum of $_____ to be hereafter taxed by the Court.

The Judgment in this case shall bear interest at the rate prescribed by law until fully paid.

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Civil No. A1-80-120

KENNETH A. HEROLD and JANET HEROLD,
Plaintiffs,

vs.

BURLINGTON NORTHERN, INC., a foreign corporation,
Defendant.

[Filed June 7, 1983]

MEMORANDUM AND ORDER

Defendant seeks to have stricken from the second Amended Complaint, Count I, paragraphs a.f.g.i.k.p. and s., as they relate in any way to:

1. A railroad duty to have different lights on the engine, or any daylight lights;
2. A railroad duty to change the paint on the train; and
3. A railroad duty to install active signals at the crossing.

(Docket No. 65)

Paralelling the motion to strike is a motion for a protective order to relieve the defendant from answering interrogatories which are addressed to the same issues.

The plaintiffs claim the defendant railroad negligently caused a collision between its railroad engine and plaintiffs' truck.

The basic purpose of the motion is to limit the proof to areas where a possibility of liability exists. Defendant asserts that the accident happened during daylight hours, and therefore items like color of railroad engine, rotating beacons on the engine, and moving crossing signals or barriers, are no justification for plaintiffs' failure to see the train.

The railroad's position is that it has no duty to use a particular type of light on its engine once it has met statutory or regulatory agency rules to that point. Thus, the pleadings as to lights state no claim upon which relief could be granted, and therefore interrogatories addressed to lights are not an inquiry as to any matter, not privileged, which is relevant to the subject matter involved in the pending action. Fed. R. Civ. P. 26(b)(1).

The above statement of the railroad's position is equally applicable to the pleadings as to the paint scheme on the engine, and the interrogatories addressed to that question.

It is generally recognized that railroads have a common law duty of care. See *Johnson* v. *Grand Trunk Western R. Co.*, 228 N.W.2d 795, p. 800 (Mich. 1975).

N.D.C.C. § 9-10-06 adopts the common law rule in its provision that:

> Everyone is responsible . . . for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person.

And, as stated more precisely as to plaintiffs' claim in this matter:

> It is negligence to use an instrumentality, whether a human being or a thing, which the actor knows or should know to be so incompetent, in appropriate, or defective, that its use involves an unreasonable risk of harm to others. Restatement, Second, Torts § 307.

I conclude that the plaintiffs' claims of improper lighting and improper marking by paint scheme do state claims upon which relief can be granted.

Therefore,

IT IS ORDERED that the motions to strike the pleadings addressed to a railroad's duty to have different lights on the engine, or any other daylight lights: and the pleadings addressed to a railroad's duty to change the paint on the train, are *denied.*

IT IS FURTHER ORDERED that the motion for protective order against those interrogatories is *denied.*

Defendant also says it has no duty to install active signals at the crossing.

The Schnell crossing is at best a "ragged" crossing. It is adjacent to the parking and yard area of a cattle sales ring. Trucks and farm vehicles which are capable of negotiating rough ground and obstacles such as railroad tracks, are equally capable of utilizing the crossing area without too much attention to the precise limits of the roadway.

In North Dakota, prior to 1979, the railroad's obligation to establish and maintain signals at crossings was limited to installing and maintaining cross bucks. Only after the Public Service Commission of the State of North Dakota found the crossing to be extra hazardous or unusually dangerous, could the railroad be held to a duty to provide additional crossing markers or barriers. N.D.C.C. § 24-09-04 (prior to the 1979 amendment). *South* v. *National R.R. Passenger Corp.*, N.D., 290 N.W. 2d 819, p. 827 (1980).

I conclude that the defendant had no duty to provide additional crossing signals.

Therefore,

IT IS FURTHER ORDERED that those portions of the second Amended Complaint which assert that the

defendant had a duty to install active signals at the crossing are *stricken*, and the defendants shall not be required to answer those interrogatories addressed to the problem of signal standards and equipment at a crossing.

Bismarck, North Dakota, this 7th day of June, 1983.

BY THE COURT:

/s/ Bruce M. Van Sickle
BRUCE M. VAN SICKLE
Judge
United States District Court

STATUTES

Section 2 of the Boiler Inspection Act, as amended, 45 U.S.C. § 23 (1982), provides:

> It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 22 to 29 and 31 to 34 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

Section 202(a) of the Federal Railroad Safety Act of 1970, as amended, 45 U.S.C. § 431(a) (1982), provides:

> The Secretary of Transportation (hereafter in this subchapter referred to as the "Secretary") shall (1) prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety supplementing provisions of law and regulations in effect on October 16, 1970, and (2) conduct, as necessary, research, development, testing, evaluation, and training for all areas of railroad safety. However, nothing in this subchapter shall prohibit the bargaining representatives of common carriers and their employees from entering into collective bargaining agreements under the Railway Labor Act [45 U.S.C. 151 et seq.], including agreements relating to qualifications of employees, which are not inconsistent with rules, regulations, orders, or standards prescribed by the Secretary under this subchapter. Nothing in this subchapter shall be con-

strued to give the Secretary authority to issue rules, regulations, orders, and standards relating to qualifications of employees, except such qualifications as are specifically related to safety.

Section 205 of the Federal Railroad Safety Act of 1970, 45 U.S.C. § 434 (1982), provides:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

REGULATIONS

49 C.F.R. § 230.231(a) (1974), which was in effect at the time of the accident, provided:

> *Road locomotives.* Each locomotive used in road service between sunset and sunrise shall have a headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive who possesses the usual visual capacity required of locomotive enginemen, to see in a clear atmosphere, a dark, object as large as a man of a average size standing erect at a distance of at least 800 feet ahead and in front of such headlight; and such headlight must be maintained in good condition.

49 C.F.R. § 230.234 (1974), which was in effect at the time of the accident, provided:

> Each locomotive shall be provided with a suitable whistle, or its equivalent, so arranged that it may be conveniently operated by the engineer or motorman from his position in the cab.

EXCERPTS FROM THE TESTIMONY OF RAYMOND WILLIAM SPANNRING

[Tr. 839-46 (in Chambers)]

* * * *

[839] BY MR. MAGILL:

Q. Would you state your name, please?

A. Raymond William Spannring.

Q. And where do you live now?

A. I presently reside in Corvallis, Montana.

Q. And in 1974 were you the chief mechanical officer of the Burlington Northern Railroad?

A. Yes; I was.

Q. And just very briefly explain to the Judge the role of the chief mechanical officer?

A. Well, my principal responsibilities was to establish maintenance and overhaul repair policies for the Burlington Northern locomotive fleet.

[840] Q. And as such are you familiar with the Boiler Inspection Act?

A. Yes, sir.

Q. And you're familiar with federal inspectors?

A. Yes, sir.

Q. In fact back in 1974 how many federal inspectors under the federal law were assigned to the Burlington Northern system?

A. I can't answer that. At that time, and I think they still are, are assigned in districts, and they aren't assigned specifically to a railroad. They handle railroads—all the railroads within their district.

Q. Well—go ahead.

A. I would say there were probably 15 to 20 involved in inspecting Burlington Northern locomotives at that time.

Q. By the year 1974, Mr. Spannring, how many years had you been in this field regarding locomotives and the Boiler Inspection Act, just approximately?

A. Since 1958.

Q. All right. Now I have asked you to study certain language in the Boiler Inspection Act, have I not?

A. Yes, sir.

Q. And one of the items that I've asked you to study is the item of parts or attachments, and I'll ask you that question, first.

MR. MAGILL: I'm going to direct a question, first, [841] Your Honor, to the provisions in the *Marshall* case at page 4, line 18.

Q. (MR. MAGILL CONTINUING) In your opinion as a mechanical man, former chief mechanical officer of the Burlington Northern, is the amber rotating beacon a part or attachment definitely prescribed by lawful order of the Federal Government, namely the Department of Transportation?

A. No; it is not.

Q. Is it an integral or essential part of a completed locomotive within the Boiler Inspection Act?

A. No; it is not.

Q. Now, in 1974, approximately how many over-the-road engines—well, all engines—did the Burlington Northern have?

A. As I recall, in the neighborhood of 2,500.

Q. And in 1974 approximately how many of these 2500 locomotives did not have any alerting lights other than the federally mandated twin headlight?

A. I can't give an exact figure, but I would feel comfortable to say there was in excess of 400 of the old locomotives operating without revolving amber lights.

Q. Of those 400 locomotives in 1974 that were operating without—they were operating without amber rotating lights or any other rotating light other than the federally mandated twin headlight; is that correct?

A. That is correct.

[842] Q. Now would any federal inspector at any time back in 1974 cite the Burlington Northern under the Boiler Inspection Act, 45 USC, Section 22 or 23, for any violations of federal law because these 400 of the 2500

engines did not have an alerting device beyond the federally mandated twin headlight?

MR. HOYT: Now, Your Honor, the testimony so far has come entirely through leading questions of a person who is supposed to be an expert and suggest the answer, and it's contrary to the Rules.

MR. MAGILL: Okay. Fine. I'll shorten it up and will not ask leading questions.

THE COURT: Would you proceed?

MR. MAGILL: Okay.

Q. (MR. MAGILL CONTINUING) Did the federal inspectors ever cite the Burlington Northern for not having additional warning lights beyond the twin headlight back in 1974?

A. Not to my knowledge.

Q. Well, you would know if they did, wouldn't you?

MR. HOYT: That's the type of question, Your Honor, that's making a poor record.

THE COURT: We're in chambers. It's as though I were listening to—I was the decider of fact in a case, and I am, of course, in chambers.

MR. HOYT: Yes, Your Honor. I forgot about that. I apologize.

[843] THE COURT: Let's go right to the root of this and go on. We've got to start at 9:00.

MR. MAGILL: Okay.

Q. (MR. MAGILL CONTINUING) And so did these 400 engines in 1974 out of the 2500, did they operate throughout the system without the amber rotating light?

A. Yes; they did. There was one—I would like to make one point. In the State of Washington there was a law requiring a light other than the color of the headlight on the locomotive and when these locomotives were operated in the State of Washington they were required to be in a trailing position, not in the lead position on the train. So there was some inconvenience to the Transportation Department.

Q. Okay. Now let's get down to the mechanics of the amber rotating light.

The engine as it comes from the factory is not equipped with an amber rotating light, is it?

A. Not unless it is specified by the purchaser, at an added cost.

Q. And isn't that an accessory that the purchaser adds to the locomotive after the locomotive is built?

A. That is correct.

Q. And you examined the amber rotating light mount on the engine, did you not?

A. Yes; I did.

[844] Q. On 5340?

A. (Nods.)

Q. In your opinion, how long would it take to take that amber rotating light off?

A. Five minutes.

Q. What kind of tools can you take it off with?

A. Any—I think you can take it off with a plier, but a crescent wrench or a regular socket or box wrench would be more appropriate.

Q. How many bolts are involved?

A. Three.

Q. And will that engine operate safely without that amber rotating light on it?

A. Yes, sir.

Q. And many of them operate without them?

A. Yes, sir.

Q. My last question is this: Tell the Court why that amber rotating—no. I've got two questions.

MR. MAGILL: Would you mark this as a Court exhibit?

Q. (MR. MAGILL CONTINUING) Was it the Washington State requirement one of the reasons why you had to put the amber rotating light on?

A. That was a determining factor; probably the most important factor.

Q. Now showing you what has been marked as Court Exhibit No. [845] 1. This is a photograph taken just immediately after the accident on November 21, 1974,

and you'll note the camera is facing towards the engine. From that photograph is the amber rotating light on or off the engine?

A. It is off the engine.

Q. There's no—there's no doubt about that, is there?

A. No, there's no doubt. If you look closely, you can see the bracket where it would normally be mounted.

Q. Thank you. If the amber rotating light were on, it would be just above that top headlight, would it not?

A. That's correct.

Q. Well, there are many other railroads in the Unitcd Satetes in 1974 that did not have these types of alerting lights; is that correct?

A. Yes.

Q. Okay. My last question is this: Why was that light off, to your knowledge, on November 21, 1974?

A. I can't answer specificially for this locomotive, but at that period of time we were standardized on a Prime 8901 type light, which was a relatively new innovation insofar as that type of light is concerned. Previous models were rotated by mechanical means and this was a solid state, what they call an RC circuit—a resistance condenser circuit—that sequenced the flashing of four lights to give the impression of a rotating light, and that RC circuit could not survive under [846] the railroad environment of vibration, heat and cold and we were experiencing many failures of the RC circuit and the Prime Manufacturing Company was unable really to keep up with our parts demands and so there was a back-log of bad-order lights at our repair shops at both Livingston, Montana and West Burlington, Iowa, and our only recourse at that time was to go to a light that we thought would be more suitable to the railroad environment. Se we switched to a Federal—I can't remember the model number—but it was, again, mechanically driven.

* * * *

EXCERPTS FROM THE TESTIMONY OF RUSSEL DIXON

[Tr. 1802-03, 1806, 2019-21]

* * * *

[1802] BY MR. MAGILL:

Q. Mr. Dixon, I'm way over here, so if you would listen to my question and turn to the jury and address them with your answers, I think the jury would be more comfortable.

A. Okay.

Q. Would you please state your name?

A. Russel Dixon.

Q. The jury's over there, sir.

A. Russel Dixon. I'm sorry.

Q. Okay. Where are you from, Mr. Dixon?

A. Vancouver, Washington.

Q. And how long have you lived there?

A. About 13 and a half years.

Q. What is your occupation, sir?

A. I'm retired.

Q. And how long have you been retired?

A. Four months.

Q. Okay. Prior to your retirement, who was your employer?

A. The Federal Railroad Administration for the Federal [1803] Government.

Q. Would you tell the—how long were you employed with them?

A. Twenty-four years.

Q. Beginning when?

A. Twenty-four years—back in 19 sixty—

Q. '59?

A. Yes; '59.

* * * *

[1806] Q. What position did you rise to in the Portland office?

A. When I first went to Portland, I was the supervisor for a seven-state region and Alaska, responsible for

all of the safety equipment functions for equipment. I had seven equipment inspectors that worked under my guidance and also state inspectors that were under a Federal program; there was four of those.

Q. And did you have jurisdiction over North Dakota?

A. Yes, sir.

Q. What other states? What other states?

A. Oregon, Washington, Montana, Idaho, Wyoming, North and South Dakota and Alaska.

* * * *

[2019] Q. Mr. Dixon, assume that engine 5340, which is the engine involved in this accident, had been fitted with a rotating amber beacon prior to November 21, 1974. Would you first make that assumption?

A. Yes.

Q. That there is an amber rotating beacon on.

A. Yes, sir.

Q. And assume further that said amber rotating beacon had been physically detached and removed from the engine at the time of the crossing accident on November 21, 1974. Now those are the two assumptions. It was on before the accident and then it was detached before the accident. And that the amber rotating beacon was not on; it had been detached at the time of the accident. Based upon your knowledge and experience, does the Boiler Inspection Act or any other federal law or regulation require a locomotive engine, such as engine 5340, [2020] to have a rotating amber beacon flashing when the engine is in use?

A. No, sir.

Q. To state the question another way: As an FRA inspector, would an engine in service, such as 5340, without a rotating amber beacon in place on the unit, be cited as in violation of the Boiler Inspection Act or any other law or regulation?

A. No, sir.

Q. Based upon your knowledge and experience, does the Boiler Inspection Act or any other law or regulation

require a railroad to have a rotating amber beacon in place on its locomotive engines in service?

A. No, sir.

Q. Two more questions, then I'll be done.

Now, the evidence in this case will show, and it is beyond dispute, that the amber rotating beacon had been detached from engine 5340 at the time of the accident on November 21, 1974. With the amber rotating beacon detached and not on the engine, was it then in its detached state—that is, the engine without the amber rotating beacon—a part or attachment definitely prescribed by lawful order of the Secretary of Transportation?

A. No, sir.

Q. With the amber rotating beacon being detached at the time of the accident and not attached to the engine, was it an [2021] integral or essential part of a complete locomotive?

A. No, sir.

MR. MAGILL: That's all, Your Honor, on this witness.

* * * *

JURY INSTRUCTION NO. 13

RAILROAD DUTIES ARISING FROM STATUTES AND REGULATIONS

The duty of the railroad to exercise reasonable care at public highway crossings is not necessarily fulfilled by compliance with the statutes given to you in these instructions, or with the regulations governmental agencies may have promulgated. Statutes and regulations, unless otherwise specified, prescribe the measure of care required by the railroad company as to those matters covered by the statute.

JURY INSTRUCTION NO. 19

DUTY TO MAINTAIN AMBER BEACON

The amber rotating beacon which was on the locomotive when it was first purchased by the railroad is an appurtenance.

Section 23 of 45 United States Code provides, in part, that:

> It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb.